A **AIR EXPRESS INTERNATIONAL (M) SDN BHD**

**v.**

**MISC AGENCIES SDN BHD**

B COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
ALIZATUL KHAIR OSMAN JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-02-168-2008]
C 27 SEPTEMBER 2011

***CUSTOMS AND EXCISE:*** *Customs duties - Payment - Whether appellant's banker's cheque wrongfully used by respondent to pay its own customs duties - Whether respondent enriched by receiving benefit of* D *appellant's banker's cheque - Whether refusal of appellant's declaratory relief unjust and inappropriate - Whether appellant's claim against respondent established - Whether trial judge erred in findings*

The appellant, a company involved in the business of delivering consignment and customs clearance for its customers, had on E 26 March 1998, made a declaration to the Pengarah Kastam Negeri, Subang ('PKNS') *via* Customs K1 Form No W11103021323 ('Form K1') of its customer's consignment. The appellant had instructed its bank, Malayan Banking Berhad (MBB) to issue a banker's cheque payable to PKNS. The payment was proved by F an endorsement on the said Form K1. However, on 16 March 1999, the appellant was informed by the Customs Preventive Officer (PW2) that the import duty payable on the appellant's Form K1 had not been paid yet. Investigations revealed that the appellant's banker's cheque dated 30 March 1998 for the sum of G RM93,813.24 was deposited into the customs RHB's (RHB Bank Berhad) account. The appellant alleged that the said banker's cheque had been wrongfully used by the respondent to pay for its customer's consignment import duties. The appellant commenced an action at the High Court against the respondent H for, *inter alia*, a declaration that the said payment *vide* the appellant's banker's cheque for the said sum was a valid payment by the appellant for the import and sales tax duty for Form K1 and that the customs does the necessary rectification to the consignment duty by crediting the sum of RM93,813.24 to reflect I that Customs Form K1 W11103021323 had been paid by the

appellant *vide* the appellant's banker's cheque. The High Court dismissed the appellant's claim and found that the application of the appellant's banker's cheque to payments on other account *ie*, the respondent's account could only have occurred when the said banker's cheque was in the hands of the Customs Department. The High Court further refused to make any order against the Customs Department on the ground that the Customs Department had not been made a party. The appellant appealed against the said decision.

**Held (allowing the appeal with costs)**
**Per Ramly Ali JCA delivering the judgment of the court:**

**(1)** There was sufficient evidence to show that the appellant had declared to the Customs Department in respect of its own customer's consignment *vide* customs Form K1. The appellant had paid the said duties by MBB Banker's cheque no. 213709 for the same amount. PW2's oral testimony also showed that based on his departmental investigation into the matter, the appellant's banker's cheque was used by a third party. On the balance of probabilities and on the totality of the whole evidence, the appellant had proved and discharged its burden of proof that (i) the appellant had paid the import duty to the customs and on that basis the consignment was released and delivered to the appellant's customers and (ii) the said banker's cheque belonging to the appellant was wrongfully used by the respondent to pay its own custom's duties and that the respondent had wrongfully used the said banker's cheque knowingly. (paras 13 & 16)

**(2)** The learned judge had made a wrong finding in dismissing the appellant's declaratory application merely on the grounds that the Customs Department was not made a party to the proceedings. The learned judge should have granted the declaration prayed for particularly when there was evidence to show that PW2 admitted in his testimony that the appellant's said banker's cheque was wrongfully used by a third party and the said party was the respondent. To refuse such a declaratory relief to the appellant in the circumstances of the case was clearly unjust and inappropriate. Further, there was no legal impediment for the court to grant the appellant in respect of its prayer *ie*, to order the Customs Department to do the necessary rectification to the consignment duty. (paras 19 & 20)

**(3)** The evidence adduced clearly indicated that the respondent was enriched by receiving the benefit of the value of the appellant's banker's cheque. The respondent had benefited from the appellant's banker's cheque and it had not shown it had itself paid the customs duties. The enjoyment of the benefit of the banker's cheque by the respondent was at the expense of the appellant. On the facts and circumstances of the present case, the continued retention of the benefit by the respondent was totally unjust. The learned judge's decision to disallow the appellant's claim was not in line with the evidence adduced. There was ample evidence on the balance of probabilities to establish the appellant's claim against the respondent. (paras 24 & 25)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu, sebuah syarikat yang terlibat dalam perniagaan menyampaikan konsainan dan pelepasan kastam bagi pelanggan-pelanggannya, telah pada 26 Mac 1998, membuat satu pengisytiharan kepada Pengarah Kastam Negeri, Subang ('PKNS') melalui Borang Kastam K1 No W11103021323 ('Borang K1') mengenai konsainan pelanggannya. Perayu telah mengarahkan banknya, Malayan Banking Berhad (MBB) untuk mengeluarkan cek bank kepada PKNS. Bayaran dibuktikan melalui pengesahan ke atas Borang K1. Bagaimanapun, pada 16 Mac 1999, perayu telah diberitahu oleh Pegawai Pencegahan Kastam (PW2) bahawa duti import yang harus dibayar atas Borang K1 belum dibayar. Siasatan mendedahkan bahawa cek bank perayu bertarikh 30 Mac 1998 bagi jumlah RM93,813.24 telah didepositkan ke dalam akaun RHB kastam (RHB Bank Berhad). Perayu mendakwa bahawa cek bank tersebut telah secara salah digunakan oleh responden untuk membayar duti import konsainan pelanggannya. Perayu memulakan tindakan di Mahkamah Tinggi terhadap responden untuk, antara lain, satu pengisytiharan bahawa bayaran tersebut melalui cek bank perayu bagi jumlah tersebut adalah bayaran sah oleh perayu bagi duti cukai import dan jualan untuk Borang K1 dan pihak kastam harus membuat pembetulan yang perlu kepada duti konsainan dengan mengkreditkan jumlah RM93,813.24 untuk mencerminkan Borang Kastam K1 W11103021323 telah dibayar oleh perayu melalui cek bank perayu. Mahkamah Tinggi menolak tuntutan perayu dan mendapati bahawa penggunaan cek bank perayu sebagai bayaran kepada akaun lain contohnya akaun responden hanya boleh berlaku apabila cek bank tersebut berada di dalam

milikan Jabatan Kastam. Mahkamah Tinggi seterusnya enggan membuat perintah terhadap Jabatan Kastam atas alasan bahawa Jabatan Kastam tidak dibuat sebagai pihak yang terlibat. Perayu merayu terhadap keputusan tersebut.

**Diputuskan (membenarkan rayuan dengan kos)**
**Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:**

**(1)** Terdapat bukti yang mencukupi untuk menunjukkan perayu telah membuat pengisytiharan kepada Jabatan Kastam berkenaan konsainan pelanggannya melalui Borang Kastam K1. Perayu telah membayar duti-duti tersebut melalui cek bank MBB no 213709 bagi amaun yang sama. Testimoni lisan PW2 juga menunjukkan bahawa berdasarkan penyiasatan jabatan berhubungan perkara itu, cek bank perayu telah digunakan oleh pihak ketiga. Atas imbangan kebarangkalian dan atas keseluruhan keterangan sepenuhnya, perayu telah membuktikan dan melepaskan beban bukti bahawa (i) perayu telah membayar duti import kepada kastam dan atas dasar itu konsainan telah dikeluarkan dan dihantar kepada pelanggan-pelanggan perayu dan (ii) cek bank perayu tersebut secara salah telah digunakan oleh responden untuk membayar duti-duti pelanggan-pelanggannya sendiri dan responden sendiri sedar bahawa responden telah dengan salah menggunakan cek bank tersebut

**(2)** Yang arif hakim telah membuat keputusan yang salah apabila menolak permohonan pengisytiharan perayu hanya atas alasan-alasan bahawa Jabatan Kastam tidak dijadikan suatu pihak kepada prosiding itu. Yang arif hakim seharusnya membenarkan pengisytiharan yang dituntut terutamanya apabila terdapat bukti yang menunjukkan PW2 membuat pengakuan di dalam testimoni bahawa cek bank perayu tersebut telah secara salah digunakan oleh pihak ketiga dan pihak tersebut adalah responden. Untuk menolak relif pengisytiharan perayu dalam keadaan kes ini jelas tidak adil dan tidak sesuai. Seterusnya, tiada halangan undang-undang bagi mahkamah membenarkan permohonan perayu iaitu untuk membuat satu perintah supaya Jabatan Kastam melakukan pembetulan perlu kepada duti konsainan.

**(3)** Keterangan yang dikemukakan jelas menunjukkan bahawa responden telah diperkaya dengan penerimaan manfaat daripada nilai cek bank perayu. Responden telah mendapat faedah dari cek bank perayu dan ia tidak menunjukkan bahawa ia sendiri telah membayar duti-duti kastam. Responden dapat

menikmati faedah cek bank atas perbelanjaan perayu. Atas fakta dan hal keadaan kes ini, pengekalan berterusan faedah tersebut oleh responden sama sekali tidak adil. Keputusan yang arif hakim untuk tidak membenarkan tuntutan perayu tidak selaras dengan keterangan yang dikemukakan. Terdapat beberapa keterangan atas imbangan kebarangkalian untuk membenarkan tuntutan perayu terhadap responden.

**Case(s) referred to:**
*Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC* ***(refd)***
*Ikebife Ibeneweka & Ors v. Peter Egbuno & Anor [1964] 1 WLR 219* ***(refd)***
*Magnum Finance Berhad v. Tan Ah Poi & Anor [1997] 4 CLJ Supp 44 HC* ***(refd)***
*PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC* ***(refd)***
*Sediperak Sdn Bhd v. Baboo Chowdury [1999] 5 CLJ 31 HC* ***(refd)***

**Legislation referred to:**
Contracts Act 1950, s. 71

*For the appellant - R Subitra Dali; M/s Surend Mokhzani & Partners*
*For the respondent - Zulkifli Omar (Azmer Saad with him); M/s Lainah Yaacob & Zulkepli*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Ramly Ali JCA:**

**[1]** This is an appeal by the plaintiff/appellant against the decision of the High Court in dismissing its claim with no order as to costs.

**The Appellant's Claim**

**[2]** The appellant, Air Express International (M) Sdn Bhd, at all material times was a company involved in a business of delivering consignment and customs' clearance for its customers. On or about 26 March 1998, the appellant had made a declaration to the Pengarah Kastam Negeri Subang *via* Customs K1 Form No. W11103021323 of its customer's consignment. The import duty payable for the consignment was RM93,813.24.

**[3]** On or about 30 March 1998, the appellant had instructed its bank, Malayan Banking Berhad (MBB) to issue a banker's cheque payable to "Pengarah Kastam Negeri Subang". MBB issued the said banker's cheque bearing No. 213709 for the sum of RM93,813.24, being the amount of the import duty due to the customs. The payment was proved by an endorsement on the said Form K1. The appellant was then allowed to take out the consignment since the duty was paid on 30 March 1998 and had delivered the consignment to its customer.

**[4]** Nearly a year later (on 16 March 1999) the appellant was informed by the Customs Preventive Officer (PW2) that the import duty payable on the Appellant's Form K1 had not been paid yet.

**[5]** Initial investigation, revealed that the appellant's banker's cheque dated 30 March 1998 for the sum of RM93,813.24 was deposited into the customs RHB's (RHB Bank Berhad) account no. 014118157214. Upon further investigation the appellant alleged that the said banker's cheque had been wrongfully used by the respondent to pay for its customer's consignment import duties. The appellant's investigation also revealed that the respondent was also involved in a similar business such as the appellant and at the material time the respondent's customer was Tenaga Nasional Berhad (TNB).

**[6]** The appellant commenced the present action at the Kuala Lumpur High Court against the respondent for the following orders:

(a) a declaration that the said payment *vide* the appellant's banker's cheque for the sum of RM93,813,24 dated 30 March 1998 was a valid payment by the appellant for the import and sales tax duty for Customs Form K1 W11103021323 dated 26 March 1998;

(b) in the alternative, the respondent is to pay to the appellant a sum of RM93,813.24 as damages for the usage of the appellant's banker's cheque;

(c) that the customs does the necessary rectification to the consignment duty by crediting the sum of RM93,813.24 to reflect that Customs Form K1 W11103021323 dated 26 March 1998 has been paid by the appellant *vide* the appellant's banker's cheque;

(d) costs to be borne by the respondent and paid to the appellant;

(e) general damages to be taxed; and

(f) any other order and/or relief as deemed fit by the High Court.

**The Respondent's Defence**

**[7]** In the statement of defence, the respondent pleaded *inter alia*, that the respondent had no knowledge of the appellant's banker's cheque and/or the other documents referred to in the appellant's statement of claim and put the appellant to strict proof thereof. The respondent also pleaded in the alternative that even if the appellant's banker's cheque was used by its worker or agent, the appellant did not state the name of the worker or agent or to the time and place of the alleged wrongful act. The respondent pleaded that the appellant's claim be dismissed with costs.

**[8]** On 20 March 2007, the learned High Court judge dismissed the appellant's claim without an order as to costs, after full trial. Hence the present appeal before us.

**The Appellant's Reply**

**[9]** In its reply, the appellant contended that there was an endorsement at the back of the appellant's banker's cheque which showed that it was used by the respondent's staff or agent by name, Azim (with identity card no. A2594305) and that the receipt numbers endorsed at the back of the said banker's cheque corresponded with the receipts printed on the Respondent's Customs Form K1.

**[10]** The appellant argued that by the fact of the endorsement of receipt numbers on the back of the said banker's cheque, the appellant had discharged the heavy burden upon it of proving that the respondent had wrongfully used the appellant's said banker's cheque to pay for the customs duties payable by the respondent on behalf of its customer, TNB.

**The High Court Judge's Grounds Of Decision**

**[11]** In dismissing the appellant's claim without an order as to costs, the learned High Court judge gave the following reasons:

(a) since the appellant obtained customs clearance on 30 March 1998, the appellant's banker's cheque must have been with the Customs Department, and if applied to payments on other accounts on 27 April 1998, it could only occur when the appellant's banker's cheque is with the Customs Department;

(b) although the respondent appears to have benefited from the appellant's banker's cheque, the question remains open whether the wrongful use was by the respondent or the Customs Department. It is at least probable the error was in the Customs Department, in which case there is no ground to make orders at the appellant's instance. Although the appellant's prayers had also sought orders against the Customs Department, the Customs Department had not been made a party and the latter had not had the opportunity to defend itself against any order that might be made against it. No order may be made against the Customs Department also; and

(c) since the respondent benefited from the appellant's bankers cheque and since in these circumstances it had not shown it has itself paid, the court will not make an order of costs in its favour. There is, therefore, no order as to costs.

**Findings Of This Court**

**[12]** In his judgment the learned judge found, that the application of the appellant's banker's cheque to payments on other account ie, the respondent's account could only occur when the said banker's cheque was in the hands of the Customs Department, particularly after the appellant had obtained customs clearance on its consignment on 30 March 1998. The learned judge went on to find that "it is at least probable the error was in the Customs Department". The learned judge refused to make any order against the Customs Department on the ground that "the Customs Department had not been made a party and it had no opportunity to defend itself against any order that might be made against it".

**[13]** The learned judge failed to appreciate and to give due weight or failed to make the correct inference based on the evidence adduced before the court. There was sufficient evidence to show that the appellant had declared to the Customs Department in respect of its own customer's consignment *vide* customs Form K1, which totals to the sum of RM93,813.24; that

the appellant had paid the said duties by MBB banker's cheque no. 213709 for the same amount; that the respondent had declared to the customs in respect of its own customer's consignment *vide* 6 Form K1, of which total to the sum of RM93,809.86; that on the reverse side of the appellant's bankers cheque, there is a range of receipt numbers printed which are the same numbers printed on the Respondent's Form K1; that the 'Rekod Kutipan Hasil Juruwang' for the relevant dates shows that a sum of RM3.38 (being the difference between the amount in the appellant's banker's cheque and total amount of the import duties declared by the respondent in its Form K1) was returned to the respondent by the Customs Department; and that PW2's oral testimony wherein he admitted that based on his departmental investigation into the matter the appellant's banker's cheque was used by a third party. (PW2 is Encik Saleh A. Majid, the Customs Prevention Officer in charge of the investigation related to this matter).

**[14]** Although on one hand the learned judge in his judgment (at para 15-17 p. 32-33 of the appeal records) had accepted the appellant's evidence, yet on the other hand (at para 18, p. 34 of the appeal records) he stated that there was no evidence before the court as to how the respondent obtained the said banker's cheque and went on to dismiss the appellant's claim against the respondent.

**[15]** At p. 34, para 20 of the appeal records, the learned judge also dismissed the respondent's evidence that its customer's import duties were in fact paid by its own banker's cheques on the ground that there was no corresponding banker's cheques shown, nor was there any evidence shown whether those cheques were in fact credited into the customs accounts.

**[16]** On the balance of probabilities and on the totality of the whole evidence before the court, we are satisfied that the appellant had proven and discharged its burden of proof that the appellant has paid the import duty to the customs and on that basis the consignment was released and delivered to the appellant's customers. The appellant had also, on the balance of probabilities, proved that the said banker's cheque belonging to the appellant was wrongfully used by the respondent to pay its own customers' duties. The oral testimony of SDI, Mohd. Azim

Ishak, particularly during his cross-examination, has failed to rebut the appellant's case on the balance of probabilities on this issue. This in itself is a wrongful act on the part of the respondent. The issue as to how the respondent obtained the said banker's cheque is, to our mind, irrelevant to the issues to be considered. The appellant has discharged its burden of proof and proved that the respondent had wrongfully used the appellant's banker's cheque knowingly, and the respondent had clearly obtained a material advantage by the said use of the appellant's banker's cheque. (see: *PJTV Denson (M) Sdn Bhd & Ors. v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134 and *Magnum Finance Berhad v. Tan Ah Poi & Anor* [1997] 4 CLJ Supp 44).

**[17]** The 1st prayer (prayer a) in the appellant's statement of claim, prays for a declaratory order – a declaration that the said payment *vide* the appellant's banker's cheque for the sum of RM93,813.24 dated 30 March 1998 was a valid payment by the appellant for the import and sales tax duty for Customs Form K1 W-11103021323 dated 26 March 1998.

**[18]** PW2 – Encik Saleh A Majid, the Customs Preventive Officer in charge of the investigation related to this matter agreed and admitted that based on his investigations the said appellant's banker's cheque was used by the third party. There was sufficient evidence to prove that the said "third party" refers to the respondent.

**[19]** We are of the view that the learned judge had made a wrong finding in dismissing the appellant's declaratory application merely on the grounds that the Customs Department was not made a party to the proceedings. Viscount Radcliffe in *Ikebife Ibeneweka & Ors. v. Peter Egbuno & Anor* [1964] 1 WLR 219 at p. 226 ruled:

> However that may be, there has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the court. The above principle was adopted and followed by the Supreme Court in *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1)* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72.

**[20]** In this case, the learned judge should have granted the declaration prayed for particularly when there is evidence to show that PW2, being an officer of the Customs Department in charge of the investigation relating to this matter appeared in court and admitted in his testimony that the appellant's said banker's cheque was wrongfully used by a third party and the said third party was the respondent. Even the learned judge in his grounds of judgment had concluded that the appellant had made the payment on the customs duty in question to the amount of RM93,813.24; the error was in the Customs Department; the respondent had not shown it has itself paid the amount of its duties; and the respondent had benefited from the appellant's banker's cheque. To refuse such a declaratory relief to the appellant in the circumstances of the case, is clearly unjust and inappropriate.

**[21]** That being the case, we are also of the view that there are no legal impediment for the court to grant the appellant in respect of its prayer (c) ie, to order the Customs Department to do the necessary rectification to the consignment duty by crediting the sum of RM93,813.24 to reflect that the Customs Form K1 W-11103021323 dated has been paid by the appellant *vide* the appellant's banker's cheque. The Customs Department would not be caught by surprise if the order for rectification was granted. The Department was aware of the matter right before the appellant filed its claim in court; they had done their own internal investigation, led by PW2; and concluded that the said banker's cheque in question was wrongfully used by a third party. What the Department needed was a valid court order for rectification of the records made by the court based on the whole evidence adduced in court, where it was proven that the said third party refers to the respondent.

**[22]** Alternatively, the learned judge could also grant the alternative remedy prayed for by the appellant in prayer (b) of the claim ie, the respondent is to pay to the appellant a sum of RM93,813.24 for damages for the wrongful usage of the appellant's banker's cheque.

**[23]** The appellant stood on solid ground for the claim made as the facts and circumstances of the present case clearly point in its favour for the alternative order prayed for ie, for damages or restitution of the amount relating to the wrongful usage the

appellant's banker's cheque. Restitution means to cause the restoration of a thing, the enrichment or benefit or its money's worth received by the respondent from the wrongful usage of the appellant's banker's cheque, at the expense of the appellant. To determine unjust enrichment, either in relation to s. 71 of the Contracts Act 1950 or the common law, the appellant in this appeal must satisfy the following three enquires:

(a) that the respondent was enriched by receiving a benefit;

(b) that the benefit received was at the appellant's expense; and

(c) that the retention of the benefit by the respondent was unjust.

(See: *Sediperak Sdn Bhd v. Baboo Chowdury* [1999] 5 CLJ 31).

**[24]** In the present case, the evidence adduced as well as the grounds of judgment of the learned judge clearly indicate the respondent was enriched by receiving the benefit of the value of the appellant's banker's cheque. The evidence also showed that the said banker's cheque was wrongfully used by the respondent to pay for its customer's customs duties and as found by the learned judge "the respondent benefited from the appellant's banker's cheque and … it had not shown it has itself paid" the customs duties. Of course the enjoyment of the benefit of the banker's cheque by the respondent was at the expense of the appellant. On the facts and circumstances of the present case, the continued retention of the benefit by the respondent is totally unjust.

## Conclusion

**[25]** Based on the above considerations, and on the totality of the evidence adduced before the trial court, we are of the view that the learned judge's decision to disallow the appellant's claim was not in line with the evidence adduced. There was ample evidence, on the balance of probabilities, to establish the appellant's claim against the respondent.

**[26]** We therefore allow the appeal with costs of RM10,000 to the appellant and make an order that the deposit to be refunded to the appellant.